

IP 05-0164-CR 1 H/F USA v Perry
Magistrate Kennard P. Foster

Signed on 12/05/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
PERRY, ANTOINE,)	CAUSE NO. IP05-0164-CR-01-H/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 05-164-CR-01 (H/F)
)	
ANTOINE PERRY,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable David F. Hamilton, Judge, on November 17, 2005, designating this Magistrate Judge to conduct a hearing on the Petition for Summons or Warrant for Offender Under Supervision filed with the Court on November 16, 2005, and to submit to Judge Hamilton proposed Findings of Facts and Recommendations for disposition under Title 18 U.S.C. §§3401(i) and 3583(e).

Proceedings were held on November 28, 2005 and December 2, 2005, pursuant to Title 18 U.S.C. §3583 and Rule 32.1 of the *Federal Rules of Criminal Procedure*. At all proceedings, Mr. Perry appeared in person and with appointed counsel, Juval Scott, staff attorney with Indiana Federal Community Defender’s Office. The government appeared by Joe Vaughn, Assistant United States Attorney. On November 28, 2005, Robert Akers, U. S. Parole and Probation officer, appeared on behalf of Jason Nutter, U. S. Parole and Probation Officer. On December 2, 2005, Jason Nutter, U.

S. Parole and Probation officer, appeared. The U. S. Parole and Probation officers participated in all proceedings on both dates.

On November 28, 2005, an initial hearing was held and the Court conducted the following procedures, in accordance with Rule 32.1, *Federal Rules of Criminal Procedure*, and Title 18 U.S.C. §3583.

1. Juval Scott, staff attorney with the Indiana Federal Community Defender, was appointed to represent Mr. Perry in regard to the pending Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. Perry and his counsel who informed the Court that they had read and understood the specifications of each alleged violation and waived further reading thereof.

3. Mr. Perry was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition.

4. That Mr. Perry would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. That Mr. Perry had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. That if the preliminary hearing resulted in a finding of probable cause that Mr. Perry had violated the alleged condition or conditions of supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Hamilton's designation entered on November 17, 2005.

7. The government requested a continuance of the preliminary hearing so that Jason Nutter, Mr. Perry's assigned U. S. Parole and Probation officer, could be present.

8. Mr. Perry was continued on his previously-imposed conditions of pretrial release and the cause was re-set for preliminary hearing and, if necessary, a revocation hearing on December 2, 2005.

On December 2, 2005, the matter was reconvened. Defendant waived preliminary hearing in writing. Counsel for the parties stipulated that a revocation hearing would not be necessary in that Mr. Perry waived the preliminary hearing and would stipulate that he committed the violations contained in the Petition for Warrant or Summons for an Offender Under Supervision, filed November 16, 2005, described as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	<p>“The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.”</p> <p>The offender submitted urine tests on October 6, 2005, and November 7, 2005, which later tested positive for cocaine.</p>
2	<p>“The defendant shall participate in the home confinement program for a period of up to four months, to commence on October 6, 2005, and shall abide by all requirements of the program. The home confinement program will include electric monitoring. The defendant shall maintain a telephone at his place of residence without any special services, modems, answering machines, or cordless telephones for the above period. The defendant shall pay the costs of the program. During this time, the defendant will be restricted to his residence at all times except for employment; education; religious services; medical, substances abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the probation officer.”</p>

On November 5, 2005, the offender was out of range from 11:42 pm until his return on November 6, 2005 at 12:20 am. When confronted about this violation, the offender stated his dog ran from the house and he had to retrieve it from the neighborhood. It is noted, the offender's second positive drug test occurred the day after this violation.

- 3 **“The defendant shall report to the probation officer as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.”**

The offender's Monthly Supervision Report for September 2005 was not received until October 24, 2005. His Monthly Supervision Report for October 2005 has yet to be received.

Counsel for the parties further stipulated the following:

- 1) Mr. Perry has a relevant criminal history category of I. *See*, U.S.S.G. §7B1.4(a).
- 2) The most serious grade of violation committed by Mr. Perry constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).
- 3) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release the range of imprisonment applicable to Mr. Perry is 4 to 10 months.
- 4) The appropriate disposition for Mr. Perry's violation of the conditions of supervised release is modification of the terms of his supervised release and 120 days of intensive supervision. The government and the defendant agree that the terms of supervised release should now be modified to include:
 - i. 120 days of intensive supervision.
 - ii. The defendant shall participate in a program of testing and/or treatment for substance abuse and shall pay a portion of the fees of treatment as directed by the probation officer.
 - iii. The defendant shall submit to the search of his person, vehicle, office/business, residence and property, including computer systems and its peripheral devices with the assistance of other law enforcement as necessary. The defendant shall submit to

the seizure of contraband found by the probation officer. The defendant shall warn other occupants the premises may be subject to searches.

iv. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

In regard to the 120 days of intensive supervision, the government and the defendant are not in agreement. The defendant will assert that he should remain under electronic monitoring and home confinement for that period, while the government asserts the 120 days should be at a community corrections center.

9. The Court then placed Mr. Perry under oath and inquired directly of him whether he admitted committing the violations of supervised release contained in the Petition to Revoke Supervised Release, filed November 16, 2005. Mr. Perry admitted the violations.

The Court, having heard the admission of the defendant, the stipulations of the parties, and the arguments and discussions on behalf of each party, **NOW FINDS** that the defendant, Antoine Perry, violated the above-delineated conditions of his supervised release. The defendant's supervised release is therefore **MODIFIED** and Antoine Perry's supervised release shall continue as previously set, with the following modifications:

(1) Mr. Perry shall reside for a period of up to 120 days at a community corrections center as directed by the probation officer and shall observe the rules of that facility.

(2) Mr. Perry shall participate in a program of testing and/or treatment for substance abuse and shall pay a portion of the fees of treatment as directed by the probation officer.

(3) Mr. Perry shall submit to the search of his person, vehicle, office/business, residence and property, including computer systems and its peripheral devices with the assistance of other law enforcement as necessary. Mr. Perry shall submit to the seizure of contraband found by the probation officer. Mr. Perry shall warn other occupants the premises may be subject to searches.

(4) Mr. Perry shall cooperate in the collection of DNA as directed by the probation officer.

You are hereby notified that the District Judge may reconsider any matter assigned to a Magistrate Judge pursuant to Title 28, U.S.C. §636(b)(1)(B) and (C) and Rules 72(b) of the *Federal Rules of Criminal Procedure*. You shall have within ten days after being served with a copy of this Report and Recommendation to serve and file written objections to the proposed findings of facts and conclusions of law and recommendations of this Magistrate Judge. If written objections to the Magistrate Judge's proposed findings of facts and recommendations are made, the District Judge will make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which an objection is made.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above report and recommendation modifying Mr. Perry's supervised release.

IT IS SO RECOMMENDED this 5th day of December, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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